

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID BLAIR MILLIRON,

Defendant-Appellant.

UNPUBLISHED

September 17, 2002

No. 233341

Presque Isle Circuit Court

LC No. 99-091786-FH

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of delivery of morphine, MCL 333.7401(2)(b), and three counts of resisting and obstructing a police officer, MCL 750.479. The trial court sentenced him to twenty-three to eighty-four months imprisonment on the delivery conviction and sixteen to twenty-four months' imprisonment on each count of resisting and obstructing. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The convictions arose out of a controlled buy by undercover informant Josh Hincka, who had known defendant for about a year, and defendant's arrest four months later. At issue on appeal is a remark made by the prosecutor during his opening statement concerning the evidence he would present:

The second witness that I'm going to introduce to you today is the young man named Josh Hincka. You saw him in the courtroom earlier this morning. You will learn when Josh testifies that he had been involved for some period of time with drugs, personally involved with them. He had a problem. There were some things that had gone poorly in his personal life. He hadn't responded in a good way. He was involved with – with drugs. The defendant was a friend and an occasional user with him –

Defense counsel objected and the prosecutor changed the subject when he resumed his opening statement. Defendant subsequently moved for a mistrial, arguing that any evidence of his drug use would be inadmissible under MRE 404(b) because the prosecutor failed to notify defense counsel that he intended to introduce it. The trial court denied the motion.

On appeal, defendant argues that the prosecutor's reference to defendant's drug use without notice of intent to introduce the evidence denied him a fair trial. He contends that the lack of notice contrary to MRE 404(b)(2) unfairly prejudiced the defense because it prevented counsel from questioning potential jurors about that information and it was unrealistic to expect the jurors to disregard the prosecutor's statement. We decline to reverse on this basis.

Under MRE 404(b)(2), the prosecution must provide in advance of trial reasonable notice of the general nature of any other acts evidence it intends to introduce at trial and the rationale for its admission. This Court has treated noncompliance with the notice requirement as an evidentiary error subject to nonconstitutional harmless error analysis. See *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001). In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is deemed to have been outcome determinative if it undermined the reliability of the verdict. See *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000).

Assuming that evidence of defendant's prior drug use was otherwise admissible other acts evidence – and defendant does not contend otherwise – the lack of notice in this case was harmless error. The remark was brief and evidence of defendant's drug use, albeit after the buy in this case, was admitted at trial. Defendant's claim that defense counsel may have asked the potential jurors different questions had he known of the prosecutor's intent to produce evidence of defendant's drug use is speculative and, in any event, the judge questioned the jurors about whether they could set aside their opinions in favor of or opposed to drug use and delivery. Under these circumstances, defendant has failed to establish that it is more probable than not that the error was outcome determinative. *Lukity, supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly